IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-194

REVEREND LOUIS R. GIGANTE,

Petitioner,

against

RODERICK C. LANKLER, Deputy Attorney General of the State of New York, Special State Prosecutor,

Respondent.

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Motion for Leave to File a Brief *Amicus Curiae* in Support of the Petition for a Writ of Certiorari.

The Central Rabbinical Congress of the United States and Canada (hereinafter referred to as the "Rabbinical Congress"), hereby respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari to the New York Court of Appeals.

The consent of the Petitioner has been obtained. In response to a request for his consent, the Respondent has advised that he will take no position on that question. The letters from the attorneys for the parties have been filed with the Clerk of this Court.

The Rabbinical Congress was established in New York State in 1953. The Congress is comprised of over two hundred and fifty rabbis tending to the needs of approximately five hundred thousand orthodox Jews living in the United States and Canada. The Rabbinical Congress came into being after the Holocaust, in order to assist the dispersed survivors of the pre-war European communities in re-establishing themselves in their traditional Jewish way of life and custom. Moreover, the Rabbinical Congress was designed to serve as a key mechanism in the propagation of Jewish orthodoxy through the creation of a Bais Din, or Rabbinical Court. The primary function of this Rabbinical Court is the elucidation of Talmudic law.

The paramount interest of the Rabbinical Congress in this case stems from the fact that if the New York Court of Appeals' decision were allowed to stand, serious consequences would befall not only Father Gigante, but clergymen of all faiths and the congregations that they serve. By permitting virtually unlimited questioning into the workings of the Petitioner's ministry, the New York Court of Appeals relegated the freedom of religious exercise to a least preferred position vis-a-vis the grand jury and, most importantly, failed to define the permissible limits of such an inquiry in the context of the First Amendment to the United States Constitution.

This case is also of importance to the Rabbinical Congress owing to the fact that the Congress' Rabbinical Court was recently called upon to issue a ruling as to whether two of its affiliated rabbis could testify before a New York State grand jury that was inquiring into the sources of charitable contributions given to the rabbis for their synagague. The proposed questioning was also to explore the uses to which their monies were put in the operation

of the temple's various programs. Similar to the situation that confronted Father Gigante, these rabbis were to be probed about conversations and activities that transpired between them and members of the community to whom they minister. Again, as this *amicus curiae* reads the opinion of the Court of Appeals in Petitioner's case, the holding of that Court categorically rejected the view that the First Amenment affords Petitioner *any* protection against the intrusive inquiry of the grand jury. We are fearful, therefore, that these rabbis will fare no better than Father Gigante did in the New York courts, and thus they face the wrenching dilemma of choosing between commitment to prison or turning their backs upon their ministry.

Given the need to properly define not only the reach of a grand jury's power when it trenches upon a freedom of the first magnitude, but also the appropriate role of lower courts in their supervision of such a grand jury, it is respectfully suggested that the attached brief might be of assistance to this Court in deciding whether to grant the Petitioner's application for a writ of certiorari.

WHEREFORE, the Rabbinical Congress prays that this Court grant it leave to file the attached brief *amicus curiae*.

Dated: New York, New York
September 7, 1979

Respectfully submitted,

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BRIEF AND APPENDIX OF THE CENTRAL RABBINICAL CONGRESS OF THE UNITED STATES AND CANADA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF THE CENTRAL RABBINICAL CONGRESS OF THE UNITED STATES AND CANADA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Introductory Statement

The essential facts of record in this case, the provision of the United States Constitution involved, the pertinent New York statutory provision and the opinions of the courts below are set forth in the Petition for a Writ of Certiorari to the New York Court of Appeals. We accept them for the purpose of this brief.

Interest of the *Amicus Curiae*

The Rabbinical Congress is comprised of several hundred rabbis who tend to the spiritual needs of hundreds of thousands of congregants. These rabbis, in turn, are responsible for the administration of synagogues, religious schools and colleges, children's camps, and a myriad of programs dealing with the medical, financial and housing needs of the large orthodox Jewish population that resides throughout North America, and particularly in New York State. Like the Petitioner, many of the rabbis affiliated with the Rabbinical Congress extend their ministry beyond the simple walls of their temples. Thus, their calling takes them into environments where individuals are tended to in old age, in sickness, in conflict with the law and the seemingly boundless social service programs that are indigenous to a modern society.

Recently, two rabbis affiliated with the Rabbinical Congress were subpoenaed to testify before a New York grand jury looking into the sources of charitable contributions to their synagogue and the uses to which the money was put. The Congress, through its Rabbinical Court, issued a decree forbidding the rabbis to testify because to do so would sanction an intrusion into the most sacred domain of the exercise of a ministry. Annexed to this brief is a copy of the full text of the decree explaining the rationale of such preclusion.

The New York Court of Appeals' decision rejects the First Amendment as a protection against such a wide ranging and damaging inquiry and, rather, declares that the sole protection afforded a clergyman is that accorded by a priest-penitent privilege statute. We submit that the Court of Appeals was wrong in so holding and the issue

should be settled by this Court. Moreover, we believe that the remedy proposed later in this brief will afford a grand jury the due latitude it needs to conduct an appropriate investigation into criminality, while at the same time assuring that any intrusive questioning into the exercise of a religious ministry is warranted.

Question Presented

We submit that the appropriate question presented by this case is:

> Where a grand jury seeks the compelled testimony of a clergyman, and a particularized claim of First Amendment protection has been interposed by the minister, should a court in its role as supervisor of the grand jury require the prosecution to demonstrate that the testimony sought is essential to the justice of the case, with the balance being struck in favor of the minister when the essence of the testimony already exists in otherwise admissible forms from other sources available to the grand jury?

Argument

We respectfully submit that there are several persuasive reasons for the granting of Petitioner's application for a writ of certiorari.

I. This case demonstrates the need for guidance to lower courts when they are called upon to weigh the competing interests of a grand jury and a minister.

The Court of Appeals, in relying upon the "enduring command that every man owes a duty to society to give evidence when called upon to do so," concluded that Petitioner raised "no colorable First Amendment right." This *amicus* believes that the application of such an "enduring command" in the kneejerk fashion that was employed herein was plainly wrong. As it has been noted, "a grand jury subpoena is [not] some talisman that dissolves all constitutional protections." *United States* v. *Dionisio,* 410 U.S. 1, 11 (1973).

The New York courts concluded that this Court's decision in *Branzburg* v. *Hayes,* 408 U.S. 665 (1972), precludes any balancing of the sometimes conflicting interests of an investigatory grand jury and the exercise by a clergyman of his ministerial duties. As Mr. Justice Powell observed in his concurrence in *Branzburg*:

> "As indicated in the concluding portion of the opinion, the Court states that no harassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order

> may be entered. *The asserted claim to privilege should be judged on its own facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.* The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." *Branzburg, supra,* at 709-710. (Emphasis added) (footnotes omitted).

Certainly, the values and interests embodied in the First Amendment's free exercise clause demand no less protection than that afforded a newspaperman. *See, e.g., Sherbert* v. *Verner,* 374 U.S. 398 (1963); *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972). Simply put, the Court of Appeals opined that in view of *Branzburg's* dictates, no balancing of interests was required. This was wrong. The Respondent has asserted that a balancing test should be employed in such situations as presented herein, but his notion of balance is more fiat than careful weighing of interests. He claims:

> "It thus emerges as the prevailing law that with respect to all First Amendment freedoms in grand jury situations, the competing interests are *ipso facto* balanced in the state's favor, a *bona fide* grand jury inquiry constituting *per se* the state's 'compelling interest.'" Respondent's Brief in Opposition, at page 14. (Emphasis in original).

Such an assertion turns "balancing" on its head. It reads out of *Branzburg,* the important concurrence of Mr. Justice Powell. Accordingly, if the Respondent's view were to prevail—as it apparently has through the New York courts—the *mere* empanelling of a grand jury de-

feats *ipso fatco any* and all First Amendment claims. Such a rule would shield from scrutiny claims of harassment, bad faith and encroachment onto protected areas. Moreover, it does violence to this nation's firmly held ideal that matters of religious exercise are beyond the concern of government. It would read out of the constitution the wide latitude accorded religious ministries and turn its back on the centuries of historical conflicts that the First Amendment was designed to prevent from occurring in this country.

II. This case will provide this Court with an opportunity to fashion a remedy that will minimize clergyman-grand jury conflicts, while according to each the sufficient latitude necessary to carry out their respective functions.

We respectfully call to the Court's attention the case of *United States* v. *Nixon*, 418 U.S. 683 (1974). There, in response to a subpoena duces tecum calling for certain material, the President of the United States interposed an objection premised upon a claim of executive privilege. In passing upon such claim, this Court noted that while the President must rely on free and robust advice given to him by his confidential advisors in order to conduct this nation's most sensitive affairs, it was also true that this country's commitment to the rule of law requires, in the context of the criminal justice system, an availability of information to ensure that justice for the guilty and the innocent is surely done. The Court concluded that it was, therefore, necessary to resolve these competing interests in such manner as would preserve the essential requirements of both the Executive Branch and the judicial system.

While eschewing the existence of an absolute executive privilege to withhold evidence from the judicial system, this Court nonetheless held that the President enjoys a qualified privilege that presumptively attaches to Presidential communications. *United States* v. *Nixon, supra,* at 708. This Court went on to hold:

> "We conclude that when the ground for asserting the privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. *The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial."* *United States* v. *Nixon, supra,* at 713.

In *Nixon,* the Court set forth the manner in which a District Court should treat such a claim of privilege. If a privilege is asserted by the President, it is the duty of the court to consider the material sought as presumptively privileged. The burden is then on the prosecutor to demonstrate that the material sought is essential to the justice of the case. Courts are not unused to such procedure. Indeed, it is often a commonplace in the context of grand jury investigations that subpoenas duces tecum are challenged on grounds of reasonableness, relevance and burdensomeness. *E.g.,* Rule 17(c), Federal Rules of Criminal Procedure.

The procedure outlined in *Nixon* should apply with equal force and facility in the case before the Court. In New York, trial courts act in a supervisory capacity over the grand juries that are locally empanelled. *See generally,*

New York Criminal Procedure Law Article 190 (lower courts empanel the grand jury; appoint its foreman; swear the panel; provide it with instructions as to the proper performance of its duties; control the release of grand jury materials to third parties; pass upon all challenges to subpoenas; and generally act as the jury's legal advisor). It is respectfully suggested that the analogous remedy fashioned in *Nixon* should be carried forward to situations involving clergymen witnesses. Otherwise, *Branzburg* will be given the wooden application contended for by the Respondent and apparently applied by the New York courts. Application of the remedy suggested herein would allow the Respondent to make a showing of demonstrated, specific need and permit the supervisory court to undertake a careful review culminating in specific findings of fact that may then be examined should Petitioner remain in contempt.

CONCLUSION

The *amicus curiae* asks, therefore, that this Court grant the petition for a writ of certiorari to the New York Court of Appeals.

Dated: New York, New York
September 7, 1979

Respectfully submitted,

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APPENDIX

CENTRAL RABBINICAL CONGRESS OF THE U.S.A. AND CANADA
85 DIVISION AVENUE BROOKLYN, N.Y. 11211

EV 4-6765-6

March 19, 1979

INTRODUCTION

We are called to issue a ruling as to whether two Rabbis, who have been subpoenaed to testify before a grand jury in the State of New York, should be permitted to testify before that body concerning conversations they had with members of their Congregations; acts which followed those conversations; and the financial operations of the Bobover Yeshiva.

We have been informed that the grand jury seeks to inquire into the functioning of the Bobover Yeshiva. Specifically, the grand jury will inquire into the sources of charitable contributions; its methods of collecting these contributions, and the use to which these monies were put in the religious operations of the Yeshiva.

We have been informed that part and parcel of this inquiry will be an attempt to probe conversations and activities of the Rabbis which transpired between them and the members of the community to whom they minister.

While we recognize the obligations of every individual to cooperate with the secular authorities, we are not unmindful that a very grave situation arises when that obligation clashes with the beliefs of an individual who has dedicated his life to the following of deeply held religious precepts.

The situation reaches the critical stage when the individual is a Rabbi who serves as spiritual and religious advisor to a congregation whose very existence is premised upon their unyielding belief in the rectitude and piety of their spiritual advisors. It is precisely this situation with which we are confronted.

I

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If the Rabbis were forced to testify before the grand jury, we foresee irreparable and immediate injury befalling both the Rabbis and the community which they serve and to whom they have dedicated their lives.

To testify would, in effect, be to surrender the ministry and the obligations of spiritual advisor which each Rabbi has undertaken. If the Rabbis were to testify, they would betray the trust and sacred confidence that the community has placed in them. They would be forever torn from this position of trust and confidence and could no longer function as teachers, spiritual advisors, Rabbis, or leaders of their congregation.

Moreover, the community as a whole would suffer an even greater and more devastating injury. Each of these Rabbis plays a significant and crucial role in ministering to the Bobover community. The Bobover hassidic community is an insular community where religious instruction, prayer, and devotion is the singular and paramount concern of each of its members. To deprive this community of their chosen religious leaders would be to set the community hopelessly adrift.

If these Rabbis testify, the members of the congregation cannot help but call into question the integrity of all of their rabbis and teachers. The sanctity of the religious

leaders, who guide and educate this community, will be seriously and irrevocably demeaned if the confidence of these leaders can be subjugated to the demands of the grand jury.

If the Rabbis were to testify, the delicate fabric of reliance by the congregation upon the religious leadership, from whom they draw their sustenance, would be torn asunder. Throughout history the hassidic community in Europe, in the concentration camps, and now in the United States has sought from their Rabbis guidance, learning, leadership, and religious training. The Bobover community is guided by the teaching of their Rabbis in all they do. Irrefutably, loss of this leadership and direction will be a real and immediate consequence if the Rabbis are to testify before the grand jury. Thus, the necessity to avoid this consequence surely outweighs any benefit that would occur through their testimony.

II

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It cannot be denied that if the Rabbis' position were that of an observer of a crime or a victim of criminal conduct, they would, of necessity, fall under the dictates of secular laws and would testify without recrimination or reservation in any proceeding; for to disclose this information and the acts that followed from this information would do no violence to their rabbinical role.

But the situation with which we are faced is not at all that described above. The very nature of the inquiry are those matters which these men saw or heard or learned about because of their rabbinate. Their very position as Rabbis enabled them to gain this information, and this position of absolute trust prohibits them from testifying.

The Yeshiva is the cornerstone of the entire life of the community. It depends entirely for its existence upon the charity of its members. The Rabbis cannot divulge who donated money to the Yeshiva, the methods of such donations, and the use to which the money was put. To do so would have a chilling effect upon those who would wish to support the Yeshiva. Moreover, the very act of giving is a requirement of our religion. Disclosing these donations and the motivations behind them, e.g., atonement or penance, would make this religious act impossible to perform and subject to impermissible outside scrutiny.

The Rabbis must do everything possible to preserve their cherished role as spiritual advisors and guardians of their community. They can do nothing which would do violence to this position. The only manner in which they can avoid this injury, i.e., this destruction of their role as Rabbis and spiritual leaders of their congregation, is to refuse to testify. It is the only path which would be acceptable to their congregation and the only avenue available.

Conclusion

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It is indeed necessary that the Rabbis not testify to the matters set forth above. The total and unyielding commitment which the Rabbis have given to the hassidic community, to their religion, and to their ministry outweighs, in this instance, any material benefit which would accrue to the civil authorities.

We so direct because we are fearful that by testifying, they would breach the most sacred of confidential relationships or would give the appearance of breaching this relationship.

We direct the Rabbis not to so testify for it is the only course which will preserve the very nature and integrity of the religious community to which they have dedicated their lives.

Central Rabbinical Congress
of the U.S.A. and Canada
/s/ Rabbi M. Berkowits
Rabbi M. Berkowits
Executive Director